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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 867

CLAIRE B. COHEN, ABRAHAM M. GROSSMAN, PAULINE GROSSMAN, WILLIAM CHABINSKY and PEARL CHABINSKY,

Petitioners,

v.

LAZARUS JOSEPH and DAVID I. SHIVITZ, as trustees of PRESTON HOUSE SIRE PLAN, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. In Proceedings for the Reorganization of a Corporation under Chapter X of the Bankruptcy Act, may a person who is neither a representative of the debtor, a creditor, a stockholder, or an intervenor appeal from decisions of the reorganization court?

2. In Proceedings for the Reorganization of a Corporation under Chapter X of the Bankruptcy Act, may stockholders and bondholders of the debtor who did not object

to the approval or confirmation of the Plan of Reorganization and failed to vote with respect to said Plan appeal from the order confirming the Plan of Reorganization?

Opinions Below

Petitioners herein seek the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit ("Court of Appeals") in connection with the opinion and order of the Court of Appeals made and entered on October 6, 1965 (See Petitioners' Appendix).

The aforesaid opinion and order of the Court of Appeals was rendered in connection with the following opinions and orders of the United States District Court for the Southern District of New York ("District Court"):

(a) Opinion of the District Court dated February 8, 1965, (1a-17a)[1] and order dated February 15, 1965 (R. 330-350) approving the Plan or Reorganization for Preston House Sire Plan, Inc. ("Preston House"). Petitioner Claire B. Cohen filed a notice of appeal therefrom (R. 351-352).[2]

(b) Memorandum Opinion and Order of the District Court dated March 8, 1965 (18a) which denied the application of Claire B. Cohen to supplement and amend the findings and opinion of the District Court described above (*a*). Petitioner Claire B. Cohen appealed from the aforesaid order (Filed Apr. 16, 1965).

(c) Memorandum Opinion of the District Court dated May 18, 1965 (19a), and order dated May 28, 1965, confirming the approved Plan of Reorganization for Preston House. Petitioners Cohen, Grossman and Chabinsky appealed from the aforesaid order (R. 557-571).

1. References are to pages of respondents' appendix unless otherwise indicated.

2. References in parenthesis preceded by the letter "R" refer to the Record docketed by Petitioners.

Statement

Preston House is one of the twenty (20) subsidiary and affiliated corporations in companion reorganization proceedings under Chapter X of the Bankruptcy Act pending in the District Court. The reorganization proceedings involve the over-all Sire Plan organization which was generally engaged in the public syndication of real properties (R. 166-175).

The facts and circumstances relative to Preston House and the reorganization proceedings affecting that debtor are set forth in detail in the opinion of the District Court (1a-17a).

The petition for reorganization of Preston House under Chapter X of the Bankruptcy Act was filed in the District Court on February 16, 1963 (R. 166-175). Thereafter, Lazarus Joseph and David I. Shivitz were appointed as Reorganization Trustees (R. 166-175). Contrary to the assertion of Petitioners herein (See p. 4 of the instant petition) notice of the appointment of said Trustees was given to all creditors, stockholders, indenture trustees and the Securities & Exchange Commission in accordance with §161 of the *Bankruptcy Act,* 11 U.S.C. §561. Moreover, in accordance with §162 of the *Bankruptcy Act,* 11 U.S.C. §562, a hearing was held before the District Court in April of 1963 to consider any objections to the retention of the Reorganization Trustees. Not one objection was filed to the continued retention of the Reorganization Trustees.

During the course of the reorganization proceedings affecting Preston House, the Reorganization Trustees, proposed a Plan of Reorganization for that debtor corporation which in substance provided for the transfer of the real property owned by the debtor and the creation of a Creditors' Cash Fund (R. 223-236). The Plan of Reorgan-

ization incorporated the proposal of one Dr. Israel Weinraub to purchase the aforesaid real property (R. 223-236). Hearings were held before the court, upon due notice, to consider the approval of the Trustee's Plan of Reorganization (R. 1-130).

In connection therewith, the Petitioner, Claire B. Cohen, who had no interest in any of the Sire Plan Corporations had her attorney, Leonard Cohen, communicate with the Trustees for the purpose of inducing the said Trustees to consider the amendment or modification of their proposed Plan of Reorganization so as to substitute for the Weinraub purchase offer, a proposal made on her behalf. The Trustees were unable to reach agreement with Leonard Cohen and after due deliberation, the court approved the Trustee's Plan of Reorganization (1a-17a).

Thereafter Mrs. Cohen attempted, by application, to have the District Court supplement and amend the opinion of February 8, 1965 (R. 296-302). However, the said application was denied by the District Court (18a).

During this period, the Reorganization Trustees, in accordance with the provisions of the order of February 15, 1965 undertook and caused the distribution of the approved Plan of Reorganization to the persons entitled to receive same in accordance with §175 of the *Bankruptcy Act,* 11 U.S.C. §575, together with notice of a hearing to be had thereon, a letter of transmittal, a summary of the Plan of Reorganization and a ballot form for voting purposes, among other items (R. 534-556).

On May 17, 1965 a hearing was held before the District Court to consider the confirmation of the Trustees' Plan of Reorganization. No objections were filed in opposition to the confirmation of said Plan which incorporated the Weinraub purchase offer (R. 640-667).

Two hundred sixty-six (266) public investors hold debentures of Preston House amounting to $140,000.00 in face amount. One hundred fifty-one (151) of the said public investors filed claims, based upon the aforesaid debentures, which totaled $108,959.75 and such persons were entitled to vote on the Trustees' Plan of Reorganization. The Trustees received acceptances of the said Plan from one-hundred ten (110) debenture holders having claims totaling $85,078.65, and forty-one (41) rejections which totaled $23,881.10. Accordingly, the Trustees' Plan of Reorganization was overwhelmingly accepted by the persons most affected thereby (R. 640).

On May 28, 1965 the District Court entered the order confirming the Trustees' Plan of Reorganization for Preston House (R. 557-571).

Petitioner, Claire B. Cohen, filed a notice of appeal from the order of the District Court dated February 15, 1965, approving the Trustees' Plan of Reorganization for Preston House. In addition, a notice of appeal was filed by said petitioner from the Opinion and Order of the District Court dated March 8, 1965. Subsequent to the confirmation of the Plan of Reorganization for Preston House, Petitioners Claire B. Cohen, Grossman and Chabinsky, *jointly,* filed a notice of appeal from the Order of Confirmation dated May 28, 1965. As to the aforesaid three (3) notices of appeal, Leonard Cohen, the husband of Petitioner Claire B. Cohen, appears as the attorney for the appellants.

On August 11, 1965 the Trustees moved in the Court of Appeals to dismiss all of the aforesaid appeals on the ground that none of the appellants had standing to appeal. The Motion to Dismiss the said appeals was granted and is the subject of the instant petition.

The Petitioners' attorney has seen fit, in an effort to support the instant petition, to make outrageous and scandalous comments to impugn the honor and integrity of the District Court, the Trustees, their counsel and other attorneys who appeared in the proceedings. No useful purpose is served by dignifying the invidous remarks of Mr. Cohen by responding thereto. The baseless insinuations of Petitioners' attorney are neither relevant nor pertinent to the questions presented by the instant petition.

ARGUMENT

I. The Court of Appeals correctly dismissed the appeals of Claire B. Cohen.

It is a cardinal principle of our jurisprudential system that the right of appeal is limited to those persons who had the right to be heard in the judicial proceedings before the lower court. *Young* v. *Higbee*, 324 U. S. 204 (1945).

In proceedings for the Reorganization of a Corporation under Chapter X of the *Bankruptcy Act* the right to be heard is specifically granted to certain named parties pursuant to §206 of the *Bankruptcy Act*, 11 U.S.C. §606:

> "The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter * * *."

In accordance with §207 of the *Bankruptcy Act*, 11 U.S.C. §607, the right to be heard is extended to parties in interest who are allowed by the judge, for cause shown, to intervene generally or with respect to any specified matter.

The Petitioner, Claire B. Cohen, is concededly neither the debtor, an indenture trustee, a creditor or stockholder

of Preston House, the corporate debtor. Moreover, the said Claire B. Cohen never applied to the District Court for leave to intervene, generally, or, with respect to any specified matter involving the reorganization proceedings affecting Preston House.

A fortiori Claire B. Cohen had no right to be heard in the District Court. It is, therefore, self-evident that Claire B. Cohen has no standing to appeal from any of the decisions of the reorganization court with respect to Preston House.

In *Peckham* v. *Casalduc*, 261 F. 2d 120 (1st Cir. 1958) cert. den. 359 U. S. 958 (1959), the precise factual situation as that in the petition at bar, involving Mrs. Cohen, was presented to the court. In that case, the court dismissed an appeal filed by a claimed equitable lienor who sought to enforce his claim against shares of stock in the reorganized corporation. The court stated:

> "Peckham is *neither a creditor of Ronrico nor is he one of its stockholders.* Thus he does not have 'the right to be heard on all matters arising in a proceeding' for reorganization under Chapter X of the Bankruptcy Act conferred by §206 of that Act." 261 F. 2d at p. 121. (Emphasis supplied.)

Mrs. Cohen being neither a creditor nor stockholder of Preston House had no right to be heard under Section 206 of the *Bankruptcy Act, supra,* and, therefore, no right of appeal. Thus, it is only pursuant to Section 207 of the *Bankruptcy Act, supra,* that a right of appeal could arise in favor of Mrs. Cohen. In order to secure said right it is mandatory, under that section, that a motion for intervention be made and granted. Such is not the case herein. The fact that Mrs. Cohen's attorney did negotiate with the Reorganization Trustees, appeared at hearings held before the District Court and received notices in connection therewith does not accord to Mrs. Cohen the rights of an intervenor.

The *Peckham* case, *supra,* meets this issue squarely and in that case, where the appellant had received notices of hearings held before the reorganization court and had participated therein, the court stated:

> "* * * The fact remains that at no time in these proceedings has Peckham ever made any attempt to intervene by serving an appropriate motion in accordance with the procedure set out in Rule 24(c) of the Federal Rules of Civil Procedure, 28 U.S.C. A. *The fact that the court below allowed him to be heard and to participate in the proceedings by filing objections, being heard in argument, etc., does not serve to make him a party.* * * * Nor do the privileges accorded to him in the court below give him the right to appeal as a party from any decree of that court." 261 F. 2d at p. 121. (Emphasis supplied.)

The appeals purportedly taken by Petitioner Claire B. Cohen, who did not make any attempt to intervene, fall squarely within the four corners of the ratio decidendi enunciated by the court in the *Peckham* case, *supra.*

The cases cited by petitioners at pp. 13 and 14 of the petition herein are inapposite. There was no "judicial sale" involved in the Preston House reorganization proceedings and, hence, there could be no appeal therefrom. The appeals filed are from orders of the District Court approving and confirming a Plan of Reorganization.

Accordingly, it is abundantly clear that Petitioner, Claire B. Cohen, is a stranger to the reorganization proceedings involving Preston House and had no right to be heard in respect thereof. Consequently, Petitioner, Claire B. Cohen, had no standing to appeal from orders of the District Court and the dismissal of such appeals by the Court of Appeals was correct.

II. Petitioners Grossman and Chabinsky, having failed to object to the approval and confirmation of the Trustees' Plan of Reorganization for Preston House lack the requisite standing to appeal from the order of confirmation.

Upon the acceptance, in writing, of a Plan of Reorganization, §179 of the *Bankruptcy Act,* 11 U.S.C. §579 provides, *inter alia,* that a hearing shall be scheduled, "for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation". The aforesaid section provides that notice of said hearing shall be given to, "the debtor, creditors, stockholders, indenture trustees, Secretary of the Treasury, the Securities & Exchange Commission, and such other persons as the judge may designate". In accordance with the provisions of the order of the District Court, dated February 15, 1965, notice was given as required therein and by the applicable provisions of the *Bankruptcy Act.*

Prior thereto, notice had been given to all of the aforesaid in connection with the hearings held before the District Court to consider the approval of a Plan of Reorganization for Preston House. Extended hearings were held before the District Court for the consideration of such approval. No objections were interposed or filed to the approval of the Plan of Reorganization for Preston House proposed by the Reorganization Trustees.

Petitioners Grossman and Chabinsky received notice of the hearings on approval and did not object thereto nor appeal from the order approving the Plan of Reorganization. Furthermore, Petitioners Grossman never filed a Proof of Claim against Preston House. Petitioners Grossman and Chabinsky received notice of the hearing held

before the District Court to consider the confirmation of the approved Plan of Reorganization. The said petitioners did not affirmatively accept or reject the said Plan of Reorganization, but remained mute. Petitioners Chabinsky who were entitled to vote for acceptance or rejection of the said plan, did neither.

It is now the contention of counsel for Petitioners Grossman that said Petitioners did object to the confirmation of the said plan. This contention is wholly unsupported by the record herein.

At the hearing held before the District Court to consider the confirmation of the Plan of Reorganization, testimony was adduced to the effect that the operating income generated from the management of Preston House was insufficient to meet the expenses of operation and debt service. At the conclusion of oral testimony the following events transpired:

> "The Court: . . . All right, does anyone else want to be heard.
>
> Mr. Grossman: Yes.
>
> The Court: What is your name?
>
> Mr. Grossman: My name is Abraham Murray Grossman. I am a blind veteran.
>
> In the management—it looks like Preston House is under poor management. Is there any way you could appoint some other people to check over on this management, how it was managed, because it is poor management, and I would suggest that the court order that they have an unbiased auditor look over these books and see what is wrong with the management.
>
> The Court: I will take your suggestion under advisement, but I will hear from the Trustees' counsel."

(R. 666).

It is self-evident that Mr. Grossman's comments were directed to the operation and management of the Preston House property rather than to any objection to the Trustees' Plan of Reorganization. Moreover, Mr. Grossman's comments were ill-founded and the Trustees' counsel responded thereto in the following manner:

> "Mr. Seligson: Your Honor, I don't understand the statement 'poor management of the property.' The property is fully rented. The property was not able to take care of payments on the second and third mortgages when the reorganization petition was filed. They were in default at that time. I don't understand the statement of poor management when on the face of it there has been excellent management. There have been no vacancies at all. The trouble is that there was too much paid for the property to begin with." (R. 666-667)

Subsequently, the District Court by its memorandum opinion dated May 18, 1966 (19a) found that the property had been well managed under the Trustees' administration. In addition, the record establishes that the Trustees did retain independent certified public accountants and real estate management agents to manage the Preston House property (R. 574-774).

The instant matter is strikingly similar to that in, In *Re Kenmore-Granville Hotel Co.,* 92 F. 2d 778 (7th Cir. 1937) cert. den. sub nom *Meyer* v. *Kenmore-Granville Hotel Co.,* 302 U. S. 767 (1938). In that case the appellants were bondholders of the debtor and appealed from two orders of the District Court, one of which confirmed a Plan of Reorganization. The appellants therein had originally filed objections to the approval of the plan which objections had been overruled by the lower court. An appeal from the lower court's decision was dismissed

by the Court of Appeals for the Seventh Circuit. *Meyer* v. *Kenmore-Granville Hotel Co.*, 77 F. 2d 1004, app. dis'd, 78 F. 2d 1018 aff'd 297 U. S. 160 (1936). Thereafter, the appellants did not appear at the hearing on confirmation of the Plan of Reorganization and they did not file objections to the confirmation of said plan. However, they did file an appeal from the order of confirmation, as aforesaid.

The Court of Appeals for the Seventh Circuit dismissed the appeal filed from the order of confirmation and held that the appellants were attempting to secure the review of matters already presented and determined by the lower court. The court fully agreed with the statement made in the lower court that such an appeal, ". . . would establish a new practice, not authorized by the rules of the Court or warranted in this proceeding, to seek review after full opportunity for hearing and after failure of counsel to appear in court upon a day set for hearing, of which counsel had both notice and knowledge." 92 F. 2d at p. 780.

The principal enunciated in the *Meyer* case, *supra,* is directly in point in the case at bar. The Petitioners Grossman and Chabinsky had a full opportunity for hearing before the District Court and failed to object in anywise to the confirmation of the Plan of Reorganization for Preston House. As stated above, the Plan of Reorganization for Preston House was overwhelmingly accepted by the creditors entitled to vote thereon.

It must be respectfully noted that the Securities and Exchange Commission, at the hearing on confirmation held before the District Court, indicated its approval of the Trustees' Plan of Reorganization and, certainly, did not object to the confirmation thereof. The said Securities and Exchange Commission did not join in any of the

appeals filed by Petitioner Cohen or the appeal purportedly filed on behalf of Petitioners Grossman and Chabinsky.

An analogous situation to that presented by the instant petition arises in the approval or disapproval of compromises of controversies in the administration of bankrupt estates, pursuant to §27 of the *Bankruptcy Act*, 11 U.S.C. §50. In the usual case notice is given to all creditors and parties in interest of a trustee's application to compromise a controversy and of the hearing to be had thereon. A compromise of a controversy by a trustee which is approved by the bankruptcy court is binding on all parties. 2 *Collier, Bankruptcy* 1091, Par. 27.05 (14th ed. 1964).

In *In Re Peppers Fruit Co.*, 24 F. Supp. 119 (D.C. Cal. 1938) a proposed compromise of a controversy was approved by the referee in bankruptcy after a hearing upon due notice. At the hearing an objection to the compromise was interposed by one "Lehman", a creditor of the bankrupt. The objection was overruled. Subsequently, Lehman and two other creditors filed a Petition to Review the referee's order of approval. The two creditors who had joined with Lehman had not appeared or objected to the compromise at the hearing before the referee in bankruptcy. As to those two creditors, the District Court dismissed the Petition to Review on the ground that such creditors were not proper parties thereto. In this connection, the court stated:

> ". . . In the interest of economy and efficiency of administration of bankrupt estates, reviews from referees' orders, at least those orders which are made after notice, should be limited to applications by parties who have appeared at the hearing before the referee and participated therein. Any other

holding would leave the door open to a flood of reviews which would result not only in delay and expense, but would place an almost intolerable burden upon the district judges." 24 F. Supp. at 2121-122.

See also: *In Re Mifflingburg Body Co.*, 54 F. Supp. 560 (D.C. Pa. 1944).

The rationale expressed in the *Pepper* case, *supra*, is clearly applicable to the instant petition. Petitioners Grossman and Chabinsky at no time during the Reorganization Proceedings objected to any of the actions undertaken by the Reorganization Trustees. Despite the request of said Trustees for suggestions and proposals concerning the formulation of a Plan of Reorganization the said Petitioners remained silent. It must be borne in mind that the proceedings before the District Court relative to the formulation of a Plan of Reorganization for Preston House the approval thereof and the confirmation of said Plan extended over a period in excess of six (6) months. During this entire period, Petitioners Grossman and Chabinsky were content to allow the trustee to proceed without objection on their part. To allow Petitioners Grossman and Chabinsky to come in at this late date would place an "intolerable burden" upon the Trustees, the District Court and the Court of Appeals.

The reorganization court cannot be expected to ferret out objections which may exist in the minds of "disinterested creditors" which are never expressed. Indeed, it must be seriously pondered as to how Petitioner Cohen and Petitioners Grossman and Chabinsky came to form a "coalition" herein and the purpose thereof.

Manifestly, the Court of Appeals properly dismissed the appeals from the District Court.

III. The questions presented by the petition are moot.

Subsequent to the dismissal of the appeals described above, none of the petitioners took any affirmative action to enjoin the consummation of the Plan of Reorganization affecting Preston House. In point of fact, it was not until January 3, 1966 that the Petitioners in any wise put the Reorganization Trustees on notice as to the instant petition, two months after the consummation of that portion of the plan of reorganization requiring the transfer and conveyance of the subject property.

As indicated in the Trustees' report to the reorganization court, pursuant to §167(1) of the *Bankruptcy Act,* 11 U.S.C. §567(1) (R. 166-175), and the opinions of the District Court dated February 8, 1966 (1a-17a) and May 18, 1965 (19a) the net income generated from real property owned by Preston House was insufficient to meet all operating expenses and debt service. The District Court stated, in the opinion of May 18, 1965:

> "The Trustees cannot for lack of funds, continue to operate the property for any appreciable period".

Accordingly, the Trustees proceeded to consummate the confirmed Plan of Reorganization. On November 4, 1965 the Trustees conveyed and transferred to Dr. Israel Weinraub the real property owned by Preston House. In connection therewith the Trustees undertook the satisfaction of the outstanding mechanic's lien of record and other expenses and costs relative to the consummation of the Plan of Reorganization.

In view of the consummation of the Plan of Reorganization, the transfer and conveyance of the real property, and the complete change in position of all parties necessitated by the inability to continue to own, operate and

manage the subject property no conceivable purpose would be served by the issuance of a writ of certiorari at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1, 1966

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APPENDIX

Opinion of District Court Approving Plan of Reorganization, Dated February 8, 1965

Sugarman, D. J.

At the date of the filing of the reorganization petition herein, Preston House Sire Plan, Inc. (hereinafter called "Preston House"), one of the above-named debtors, was the the owner of certain real estate known as 444 Middle Neck Road, Great Neck, Long Island, New York. The improvements on this land consisted of a 4-story, brick, fireproof building, containing 51 apartments, aggregating 293 rooms, with 35 garage spaces in the rear of the building. The real estate then was subject to the following liens of record: a first mortgage held by the East New York Savings Bank, upon which there was then due the sum of $364,264.59; a second mortgage held by Pitkin Auto Exchange, Inc., on which there was due the sum of approximately $112,474, plus interest thereon from December, 1962 at the rate of 6% per annum; a third mortgage held by Swim City, Inc., a corporation controlled by one Harry Brock, or its assignees, on which there was a balance of principal due in the approximate amount of $73,500, and which mortgage provided for the payment of interest at the rate of 6% per annum commencing on April 1, 1961, to December 31, 1962, with interest accelerating to 19% per annum after that date if the mortgage was not satisfied; and a mechanic's lien in the amount of approximately $2,500.

Lazarus Joseph, Esq. and David I. Shivitz, Esq., the reorganization Trustees, after their appointment and qualification as Trustees, took possession of the said real

estate on February 16, 1963 and, pursuant to order of the Court, retained The J. M. Brown and J. Clarence Davies Corporation as their managing agent, and the Trustees since that time have operated and managed the real estate through such corporate agent. No interest or amortization has been paid to either the second or third mortgagee since the Trustees' qualification. All payments were made on the first mortgage held by the East New York Savings Bank, originally in the sum of $490,000, in accordance with its terms, to July 1, 1964, the date of maturity of said mortgage. The principal amount due to the first mortgagee on July 1, 1964 was $338,225.14.

The second mortgage in the sum of $145,000 was executed and delivered to the Pitkin Auto Exchange, Inc. on or about January 12, 1960. The said mortgagee allegedly paid a cash consideration of $127,600 and the balance of $17,400 constituted a bonus or discount. The mortgage was payable in monthly installments of $1,450, commencing February 12, 1960 until January 12, 1962, when the entire unpaid balance became due and payable with interest. On or about February 2, 1962, the debtor executed and delivered to Pitkin Auto Exchange, Inc. an additional mortgage in the sum of $18,224. This mortgage was then consolidated with the original second mortgage, on which there was then an outstanding balance of $110,200, to form a consolidated lien in the sum of approximately $128,424. The maturity date of the alleged consolidated second mortgage was January 12, 1964. The additional mortgage apparently represented a bonus for the extension of the time of payment of the second mortgage.

Opinion of District Court Approving Plan of Reorganization, Dated February 8, 1965

Thereafter, and on or about March 1, 1961, the debtor executed and delivered to Sire Plan, Inc. a third mortgage upon its said real estate in the sum of $67,500. Simultaneously, Sire Plan, Inc. assigned this third mortgage to Swim City, Inc., which allegedly paid $60,000 in consideration therefor. The difference of $7,500 apparently represented a bonus or discount. This third mortgage provided for the payment of interest at the rate of 6% per annum, commencing on April 1, 1961 and monthly thereafter. If the principal remained unpaid after March 1, 1962, the interest rate was to be increased to 19% per annum. On February 2, 1962 the debtor executed an additional mortgage to Swim City, Inc. in the sum of $6,250. This mortgage was subject and subordinated to the second mortgage held by Pitkin Auto Exchange, Inc. and it was consolidated with the prior third mortgage to form a single consolidated lien in the sum of $73,750, with interest at the rate of 6% per annum. The entire principal was to be paid on December 31, 1962; failing which, the interest rate was to be increased to 19% per annum. No monies were paid to the debtor by Swim City, Inc. for the additional mortgage in the sum of $6,250, which apparently was a bonus. The debtor's records do not reflect the receipt of any monies from the execution and delivery of the third mortgage in the sum of $67,500.

The debtor undertook a public offering of its preferred stock and debentures in order to raise $280,000 to finance the acquisition of the said real estate. This money was raised by the sale of 2,800 10-year, 6% debentures in the face amount of $50, and 2,800 shares of 6% cumulative non-callable participating preferred stock having a par

value of $50 per share. The debentures and preferred stock are now held by approximately 266 public investors. The debentures sold to the public were issued pursuant to a trust indenture which, among other things, stated that the corporation would not incur any obligation for borrowed money, except for corporate purposes, without the prior written consent of the holders of a majority in principal amount of the outstanding debentures. However, this consent was not required for the creation of any mortgages designed to reduce the balance of the unpaid principal of the debentures nor in the case of the refinancing of the mortgage for the purpose of obtaining a new mortgage on more favorable terms. Despite these provisions of the trust indenture the second and third mortgages were executed and delivered. The parties to the trust indenture were Preston House Sire Plan, Inc., The Sire Plan, Inc., as pledgor, and Carlisle Davidson, as trustee. This trust indenture was not recorded nor filed in any public office.

Prior to the filing of the reorganization petition, and on or about the 25th day of January, 1963, Pitkin Auto Exchange, Inc. commenced an action in the Supreme Court of the State of New York, County of Nassau, to foreclose its consolidated second mortgage. The mortgagee also applied to the Supreme Court, County of New York, in a receivership proceeding in which John T. Cahill had been appointed receiver, for leave to continue the prosecution of the foreclosure proceeding in Nassau County. The application was granted and the receivership of John T. Cahill was extended to include the foreclosure action in Nassau County. Upon the institution of the within reor-

ganization proceedings, Pitkin Auto Exchange, Inc. was specifically enjoined and stayed from further prosecution of its foreclosure proceeding.

In February, 1963, Pitkin Auto Exchange, Inc. applied to this Court for permission to continue the prosecution of the pending mortgage foreclosure proceeding. This application was denied and an appeal was taken to the United States Court of Appeals for the Second Circuit. The order of the District Court was affirmed without prejudice, however, to the right of the said second mortgagee to renew its application upon appropriate papers. The mortgagee did renew its application by notice of motion, dated May 28, 1964, and as a result of an agreement made with the Trustees that the property be offered for sale or that a plan of reorganization providing for the sale thereof be filed by the Trustees, the renewal application for permission to continue the foreclosure proceeding was adjourned *sine die*.

According to the Trustees' application for authority to offer the real estate for sale, dated June 22, 1964, the operating figures were as follows: the gross income from the real estate from February 16, 1963 to February 29, 1964 was $128,671.08. In that period of time the expenses, exclusive of debt service on the first mortgage, totalled $83,566.96. Thus, the net throw-off from operations was $45,104.12. Debt service on the first mortgage through January 1, 1964, consisting of interest and amortization, totalled $36,760. Consequently, there was available for payment upon the junior liens only the sum of $8,344.12.

In addition, the Trustees advanced from other funds the sum of $8,156, and these monies must be repaid (see

Trustees' Exhibit 1, June 8, 1964). The corporate real estate agent of the Trustees has projected for the year ending February 28, 1965 a gross income of $114,896 against total expenses, before debt service, of $83,043.50. Therefore, there will be a net of $31,852.50 before any payments in reduction of the first mortgage. (See Trustees' Exhibit 2, June 8, 1964.) Hence, the net income will be insufficient to meet the interest and amortization payments on the first mortgage lien held by the East New York Savings Bank which mortgage matured on July 1, 1964.

The Trustees, by application dated June 22, 1964, prayed for an order authorizing them to offer the real estate for sale at a public hearing, free and clear of all encumbrances, such liens and encumbrances to attach to the proceeds of sale. On June 23, 1964 the Court made an order requiring the mortgagees and other parties in interest to show cause on June 30, 1964 why the Trustees should not be granted the relief sought. After the hearing, and on the 16th day of July, 1964, an order was made granting the said application of the Trustees, authorizing the sale of the real estate on October 1, 1964, free and clear of all encumbrances, subject to a minimum sales price of $375,000, without any representations or warranties of any kind, such liens and encumbrances to attach to the proceeds of sale. That order also fixed October 8, 1964 as the date of the hearing for the consideration of the confirmation of any acceptable offer or offers to purchase the real estate.

Subsequently, the Trustees entered into negotiations with Dr. Israel Weinraub, through his counsel, Irving

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Stolz, Esq., for the purchase by him of the real estate. Dr. Weinraub offered to pay the Trustees the sum of $86,000 for the Trustees' right, title and interest in and to the real estate, subject to the first and second mortgages. This offer was conditioned, however, upon the execution and delivery to Dr. Weinraub immediately by the Trustees of an estoppel certificate in respect of the second mortgage to the extent of the amount which Dr. Weinraub had offered to pay for such second mortgage, to wit, $101,500. Under the terms of the offer, the Trustees were obligated to pay interest at the rate of 6% per annum on second mortgage indebtedness of $101,500 until title was closed, whether or not Dr. Weinraub ultimately acquired title. At the time of these negotiations, there were two violations against the real estate, one, a parking violation because of alleged insufficient space to take care of the professional tenants in the building, and the other, a violation for failure to maintain fire escapes and outside window trim in satisfactory fashion. Dr. Weinraub agreed to accept title to the building subject to these two violations. The Trustees were advised by Dr. Weinraub that concurrently with the acceptance of his offer by the Trustees, subject to ultimate Court approval, he would enter into an agreement with the holder of the second mortgage for the conditional purchase thereof.

Thereafter, and on or about the 18th day of September, 1964, the Trustees applied to the Court for authority to execute an estoppel certificate in favor of Dr. Weinraub, recognizing the consolidated second mortgage as a valid and subsisting lien to the extent of $101,500 and authorizing and empowering the Trustees to waive any and all

rights to contest the validity of such mortgage to the extent of $101,500, provided Dr. Weinraub purchased the consolidated second mortgage and irrevocably offered to purchase the debtor's real estate upon the terms mentioned. On the 25th day of September, 1964, and after a hearing held on the 21st day of September, 1964, an order was made by this Court granting the Trustees' application and authorizing the Trustees to enter into a contract with Dr. Weinraub for the purchase by him of the said real estate, subject to the approval of the Court and the requirements of Chapter X of the Bankruptcy Act. This order further provided that the contract might provide for its incorporation in a plan of reorganization, and it also vacated the provisions of the order of July 16, 1964 relating to the proposed public sale of the real estate.

On the 13th day of October, 1964, the Trustees filed a plan for the debtor's reorganization. This plan was based upon the offer of Dr. Weinraub, which was incorporated therein. In accordance with the order of the Court, dated September 25, 1964, a hearing, pursuant to Section 169 of the Bankruptcy Act, was fixed for November 10, 1964. This hearing was held on November 10, 1964 and was then adjourned to November 18, 1964 for the purpose of affording an opportunity to one Charles I. Pearson to submit a proposed plan of reorganization for the debtor. Thereafter, on November 18, 1964, an extended hearing was held for the purpose of giving further consideration to the Trustees' plan of reorganization, incorporating the offer of Dr. Weinraub and of considering the modification of the Trustees' plan so as to incorporate an offer from

Charles I. Pearson in place and stead of the offer from Dr. Weinraub.

The offer of Charles I. Pearson provided for the purchase of the real estate for the sum of $75,000, in cash. The testimony adduced at the hearing on November 18, 1964, however, established beyond peradventure of a doubt that the conditions attached to the Pearson offer could not be satisfied by the Trustees. The Trustees, under this offer, would be required to pay interest on all mortgages and this would include interest at the rate of 19% per annum from December 31, 1962 upon a principal balance of $73,500 on the consolidated third mortgage. The offer of $75,000 in cash, upon analysis, did not in fact offer the Trustees a net of that amount. The payment of interest on the third mortgage alone to December 31, 1964 would amount to $27,930. Moreover, the Pearson offer required the Trustees to make representations as to the outstanding balances on the consolidated second and third mortgages. It further provided that the Trustees could not waive their rights to contest the validity of these mortgages and that the Trustees should assign these rights to Pearson. The Trustees had issued an estoppel certificate to Dr. Weinraub, pursuant to the order of the Court, and, consequently, could not reserve the right to contest the second mortgage to the extent of $101,500. Additionally, there is some doubt as to whether the Trustees have the right to assign rights of action of the kind here involved. *Webster* v. *Barnes Banking Co.*, 113 F.2d 1003 (10th Cir. 1940); *cf. In re Downing*, 201 Fed. 93 (2d Cir. 1912). The Court advised Mr. Pearson that his proposal was unacceptable for the reasons stated but granted leave to Mr. Pearson to file an amended proposal if he desired to do so.

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By letter dated November 19, 1964, Mr. Pearson advised the Court that he was unwilling to amend any of the provisions of the proposed contract submitted by him to the Trustees herein. However, on or about the 27th day of November, 1964, the Court was advised by Albert Mintzer, originator of the Sire Plan, that Charles Pearson would be willing to amend his proposal, subject to stated conditions. An analysis of these conditions by the Court compelled the conclusion that the Pearson proposal, even as amended, would not be as advantageous to the estate as the Weinraub proposal, and Mr. Mintzer was so advised.

In the meantime and on the 25th day of November, 1964, an offer to purchase the real estate for the sum of $55,000 in cash "upon similar terms as offered to Dr. Weinraub" was made by Leonard Cohen, Esq., on behalf of a client. Because of the receipt of this offer and in the hope that a better offer might develop at a hearing which all potential purchasers would be invited to attend, the Court reopened the hearing under Section 169 of the Bankruptcy Act and fixed December 16, 1964 as the date of the reopened hearing. Notice of this reopened hearing was duly given by the Trustees to all parties in interest.

On the 16th day of December, 1964, the reopened hearing was held for the consideration of all offers to purchase the real estate of the debtor which could be incorporated in a plan of reorganization. At this hearing the Weinraub and Cohen offers were modified and there were four offers for consideration by the Court and the creditors. These offers were as follows:

1. The Weinraub offer to pay $50,000 in cash subject to the three mortgages, evidenced by the

agreement with the Trustees, dated September 28, 1964, as modified at the hearing so as to eliminate requirements concerning the use of the building and altered in other respects, incorporated in the Trustees' plan, specifically providing that the Trustees shall waive any rights to contest the validity of the consolidated second mortgage and shall recognize the same as a valid and subsisting lien against the property to the extent of the cost to Dr. Weinraub in acquiring said mortgage, to wit, $101,500, with interest at the rate of 6% per annum from the date of such acquisition. The contract further provided that, simultaneously with the closing of title, the Trustees shall waive any and all rights to contest the validity of the existing consolidated third mortgage and shall recognize such consolidated third mortgage as a valid and existing lien against the real estate and that in the event Dr. Weinraub did not acquire title to the property, such waiver would be of no force and effect;

2. The Pearson offer, which has been described above, and which, even as modified, was less advantageous to the estate of the debtor than the Weinraub offer;

3. The Cohen offer, which, in essence, contemplated the purchase of the real estate, subject to the existing first and second mortgage liens, for a cash consideration of $101,000. Under this offer, the Trustees would be required to accept the responsibility of eliminating the consolidated third mortgage; and

4. The offer of N. Edward Mitchell to purchase the property on substantially the same terms as those contained in the Cohen offer, except that the purchase price would be $100,500.

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At the conclusion of the hearing held on December 16, 1964, Mr. Cohen was advised by the Court that his client's offer, as set forth in Trustees' Exhibit 1 of December 16, 1964, and the testimony adduced in connection therewith, should be reduced to writing and properly submitted within forty-eight hours. In view of the fact that the Weinraub offer generated the other offers to purchase the debtor's real estate, the Court announced at the said hearing on December 16, 1964 that Dr. Weinraub would be given an opportunity to match any offer which might be made by Mr. Cohen's client. On or about the 21st day of December, 1964, the amended Cohen offer was received by the Trustees, having been mailed on December 18, 1964.

By letter dated December 28, 1964, as amended by letter of December 30, 1964, the Trustees analyzed the four offers and advised the Court that the Cohen offer, as amended, was the best offer submitted. It was pointed out, however, that Dr. Weinraub had been given the right to match the Cohen offer and the Trustees requested that Dr. Weinraub be directed to advise them within forty-eight hours as to whether he intended to do so.

Thereafter and by letter dated January 7, 1965, the Trustees, by their counsel, advised the Court that the Weinraub offer had been amended so as to increase the purchase price from $50,000 to $59,000. The Trustees further informed the Court that in their considered judgment the Weinraub offer, as further amended, completely matched the amended Cohen offer. It was pointed out by the Trustees that in reaching this conclusion they took into consideration the fact that they would be left with the problem of negotiating a reduction in the amount of the

consolidated third mortgage or of contesting the validity thereof. Any contest with respect to the validity of such mortgage would be time-consuming and expensive, even if the Trustees ultimately prevailed; and the Trustees recognized the fact that the outcome of such litigation was at best uncertain. The differential of $5,000 between the cash to be received under the Weinraub offer would be more than offset by the expense to the estate involved in negotiating a settlement of the third mortgage or in prosecuting a suit challenging its validity in whole or in part with the attendant expense and delay of appeals, if necessary, and the possibility of liability for the full amount of the mortgage and interest.

On or about the 3rd day of February, 1965, the Court was advised by Trustees that following their recommendation to the Court that the Weinraub offer, as amended, be accepted, further conferences were held with Leonard Cohen, Esq., who had submitted the amended Cohen offer and that such conferences had not been fruitful. Mr. Cohen refused to improve that Cohen offer and endeavored to convince counsel for the Trustees that the Cohen offer had not been matched by the amended Weinraub offer. The Trustees again recommended that their plan of reorganization, as amended so as to incorporate the amended Weinraub offer, be approved.

The Weinraub offer provides for the payment to the Trustees of the sum of $59,000 in cash; the Cohen offer for the payment to the Trustees of $101,000 in cash. Under each offer the purchaser would acquire the real estate subject to the existing first mortgage (now fully matured) in the sum of $338,225.14. The Trustees would

be responsible for the payment of interest thereon to the date of closing. The real estate would also be acquired under each offer subject to the existing consolidation second mortgage in the principal sum of $112,474, with interest thereon at the rate of 6% per annum from December 12, 1962 to September 28, 1964. The Trustees would be responsible for interest from September 28, 1964 to the date of closing, computed upon a principal outstanding balance of $101.500, the consideration paid by Dr. Weinraub in acquiring the consolidated second mortgage. Dr. Weinraub would take the property subject to the consolidated third mortgage, but under the Cohen offer, the property would be conveyed by the Trustees free and clear of the third mortgage. In the event that the Trustees were unable to make a satisfactory accommodation with the holders of the third mortgage, they would be required to contest the validity thereof. If they were unsuccessful in such contest, the Trustees would be responsible for the payment of the entire principal and interest thereon. Under those circumstances, it is not unlikely that the entire cash received under the Cohen offer would be absorbed.

The income from the real estate is insufficient to meet operating expenses. None of the offerors has indicated a willingness to make a commitment to have his offer used as an upset price at a public sale of the real estate. Even if the Trustees were successful in their efforts to invalidate the third mortgage, it would be many months, if not years, before the property could be finally disposed of. There is danger that such delay would operate adversely to the interests of this estate.

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The Court is satisfied that the Weinraub proposal, as amended, substantially matches the amended Cohen offer, if not being superior thereto. The Trustees' plan is a simple one but provides for the sale of the real estate in accordance with the amended Weinraub offer and the creation of a creditors' cash fund, for distribution as provided in the plan. The plan complies with the provisions of Section 216 of the Bankruptcy Act. It is fair, equitable and feasible.

Preston House Sire Plan, Inc. is insolvent in that the aggregate of its property, exclusive of any property which it may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay its creditors, is not at a fair valuation sufficient in amount to pay its debts. The holders of preferred and common stock of the debtor issued and outstanding have no interest in the assets of the debtor and shall not participate under the plan.

The plan of reorganization submitted by the Trustees herein and notice of a hearing on which was given to creditors, stockholders and other parties in interest by notice dated October 13, 1964, as amended to incorporate the amended Weinraub offer, is approved. However, since the reorganization petition was filed herein on February 16, 1963, the plan of reorganization cannot be confirmed within two years from that date, and the Trustees are directed to take appropriate action to contest the validity of the consolidated third mortgage prior to February 16, 1965, in order to protect the interests of this estate in the event the plan of reorganization is not confirmed and consummated. Any action taken by the Trustees to con-

test the validity of such mortgage will become moot if the Trustees' plan of reorganization, incorporating the amended Weinraub offer, is confirmed and consummated. The Trustees are also directed to take similar action in respect of the consolidated second mortgage if they deem such action appropriate in the circumstances.

This decision shall constitute the Court's findings of fact. Attached hereto is the following correspondence which is hereby made a part of this decision:

Letter dated November 19, 1964 from Charles I. Pearson, Esq., to the Court;(*)

Letter dated November 25, 1964 from Leonard Cohen, Esq. to the Court;(*)

Letter dated November 27, 1964 from Albert Mintzer to the Court accompanying letter dated November 25, 1964 from Mr. Pearson to Mr. Mintzer;(*)

Letter dated December 28, 1964 from Charles Seligson, Esq. to the Court;(*)

Letter dated January 7, 1965 from Leonard Cohen, Esq. to the Court;(*)

Letter dated January 7, 1965 from Charles Seligson, Esq. to the Court;(*)

Letter dated February 2, 1965 from Charles Seligson, Esq. to the Court.(*)

The Trustees are directed to return the deposits received by them in connection with the Cohen and Mitchell offers. They are further directed to retain the deposit received in connection with the Pearson offer, pending appropriate proceedings with respect thereto.

(*) See Record.

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Settle order of approval on notice to the Securities and Exchange Commission, Charles I. Pearson, Leonard Cohen, Levy, Murphy and Stolz, Esqs., Albert Mintzer and the East New York Savings Bank.

s/ SIDNEY SUGARMAN

United States District Judge

Dated: New York, New York
February 8, 1965